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## II.—ORIGINAL ELEMENTS IN CICERO'S IDEAL CONSTITUTION.

Although Cicero's third book *De Legibus* is chiefly concerned with the officials of the state, it does in fact contain what we should call a fairly complete constitution, stating the fundamental law in regard to the legislative, as well as the executive and judicial, branches of the government. We have here, not a description of an ideal state and its laws, both public and private, such as is contained in the treatises of Plato and Aristotle, but an actual code of fundamental public law, corresponding closely in content and form to our idea of a "written constitution." It seems that a document of this character, whether theoretical or for practical use, had never before been produced.

The modern conception of a written constitution includes several elements.<sup>1</sup> First, it is entirely embodied in one—or sometimes more than one—specially important document. Second, it is a product of conscious art, "the result of a deliberate effort on the part of a state to lay down once for all a body of coherent provisions under which its government shall be established and conducted." Third, it is of the rigid type; i. e., it stands "above the other laws of the state"; it "is repealable in a different way, exerts a superior force." Exactly such a constitution, of course, is that of the United States. The unwritten constitution, on the other hand, consists to a great extent of customary law, although it may be partially embodied in statutes, is of gradual growth, and is "promulgated or repealed in the same way as ordinary laws." Well-known examples of this type are the Roman and British constitutions.

No ancient state had a written or rigid constitution such as has been described. Complete and consciously produced codes of law, including constitutional provisions, existed, of course. But, as has been stated, the collection of "laws" in *De Legibus III* is the only ancient document which seems to correspond to the modern idea of a constitution of this kind. It is a single, consciously produced document, confining itself strictly to fun-

<sup>1</sup> For the following definitions see Bryce, *Studies in History and Jurisprudence*, Oxford, 1901, pp. 126 ff.

damental public law, according to our definition of public law. But here we must note that the Roman definition was more inclusive than that usually accepted today. The three divisions of Roman public law were *sacra*, *sacerdotes* and *magistratus*.<sup>2</sup> Therefore the laws in Book II—the basic provisions for the established religion of the state—form a part of Cicero's code of fundamental public law. This body of religious law is, however, considered an entirely distinct branch of the constitution, and those parts of it which have a political significance are for the most part repeated in the political section.

Was Cicero, then, the originator of this new idea of a "written constitution" of the type common in modern times? Did he intend his laws actually to be put in force as the constitution of a reformed Roman Republic, and protected from easy repeal by being placed "above the other laws of the state"? A number of clues to Cicero's thought in regard to his code can be found in the *De Legibus*, but they do not enable us to answer these questions completely. Certainly he did not anticipate any immediate practical use being made of these laws, but was looking forward to a possible reform of the Roman state and its government in the indefinite future. He implies in one passage<sup>3</sup> that they were written *non rei publicae sed studii et delectationis causa*, and again he admits that they would not be suitable to the degenerate Romans of his own day, but are intended for a future body of Roman citizens, who may return to the virtues and ideals of their ancestors.<sup>4</sup> But when we ask exactly how Cicero thought his code might be used by those future Romans we find ourselves in the realm of conjecture.

There is one element of the modern written constitution which Cicero might certainly have had in mind. That is its rigidity; the fact that it is more difficult to repeal than other laws. For although the Roman people in their assemblies, like the British Parliament, could theoretically pass any law, and

<sup>2</sup> Ulpan Dig. I, 1, 1, 2; *Publicum ius est quod ad statum rei Romanae spectat*, . . . *Publicum ius in sacris, in sacerdotibus, in magistratibus consistit*.

<sup>3</sup> II, 14.

<sup>4</sup> III, 29: . . . *non enim de hoc senatu nec his de hominibus qui nunc sunt, sed de futuris, si qui forte his legibus parere voluerint, haec habetur oratio*.

therefore repeal any law, there were certain legislative acts which they felt practically bound not to perform. Any intentional invasion of the rights of the gods was unthinkable, and any accidental interference with such rights was carefully guarded against in the preambles to all laws.<sup>5</sup> Laws which took the form of agreements between the Roman commonwealth and another party, such as treaties, for example, were put under the protection of the gods by being sworn to by a magistrate as the official representative of the state.<sup>6</sup> The nation was bound by a similar oath to the fundamental constitutional duty of maintaining the republican form of government; i. e., of never allowing the monarchy to be restored.<sup>7</sup> Laws thus sworn to were considered either absolutely irrevocable, or, in the case of agreements with foreign nations or individuals, revocable only under certain definite conditions, although from an abstract legal point of view this was of course not the case.

There was another kind of law of an intermediate class, which held a position above that of ordinary laws. Such were the self-imposed rules which regulated the law-making activities of the assembly.<sup>8</sup> An example is the law against *privilegia*. A bill which violated one of these rules could not become a law until the regulating law had been repealed. For example, a law containing a *privilegium* would not be valid unless the general law prohibiting *privilegia* had been repealed before it was passed. In the later Republic the repeal of any of these general regulations would hardly have been thought of; they were embodied in ancient laws which were considered a permanent part of the constitution. Hence the idea of his "laws" being made superior to other laws might easily have existed in Cicero's mind.

But it is more difficult to suppose that he had any definite idea of the existence of such a thing as a rigid, written constitution, put in force all at once as the basic law of a state. There is a possibility, of course, that he thought of some future *dictator rei publicae constituendae*, more moderate and scrupu-

<sup>5</sup> Mommsen, Roem. Staatsrecht III, p. 335, n. 2.

<sup>6</sup> Op. cit. I, pp. 235 f.

<sup>7</sup> Op. cit. III, p. 362; II, p. 16.

<sup>8</sup> Op. cit. III, pp. 334 ff.; 360 ff.

lous than Sulla,—such a man as he had hoped Pompey might turn out to be—who would use his constitution approximately in that way. But he would have been more likely to think of such a reformer's using it as a basis for a complete new code of law, which would include private as well as public law, as all the codes of the past had done; or else as a guide in the reform of the existing constitution.

It seems clear, at any rate, that Cicero did approach more closely to the modern idea of a written constitution than any other ancient statesman or political theorist. Whether he fully realized it or not, he actually seems to have written the first constitution of this kind in existence. And this new idea of drafting a document containing a complete constitution, and excluding all other kinds of law, is probably the most striking element of originality in the *De Legibus*.

The problem of discovering the original elements in the individual laws is much more concrete. Absolutely new provisions are, of course, rare. Cicero was an eclectic in political theory as well as in other branches of philosophy.<sup>9</sup> Most of his originality appears in provisions which have the character of compromises, and the resulting balanced constitution is an attempt to find the golden mean between the extremes of different periods and different parties. One of the most interesting things about the code is its clear-cut treatment of the unwritten elements of the Roman constitution—the *mores maiorum*. Some of these unwritten rules were less definite than others, and in many cases their interpretation and validity were matters of party strife. The portions of this body of unwritten law which Cicero adopts are here embodied by him in definite written form.

Let us first consider the changes which are recommended by Cicero in the legal status of the Senate. By *eius decreta rata sunt*<sup>10</sup> nothing can be meant except that senatorial decrees are to be classed definitely as laws of the state. This had certainly never been the fact from a strictly legal point of view, although custom had made it practically true to a great extent. By this provision another independent legislative body is added to the assemblies of the whole people and of the plebs. In his

<sup>9</sup> Cf. Cauer, *Ciceros politisches Denken*, Berlin 1903, pp. 8 ff.

<sup>10</sup> § 10.

commentary,<sup>11</sup> however, Cicero makes it clear that the legislative power of the assemblies is to remain superior to that of the Senate, which would make it possible for one of the assemblies to repeal a law passed by the Senate. And he evidently had no idea of recommending any great changes in the relative spheres of action of Senate and People, as is clear from his other laws.

His intention to establish legally and to increase to some extent the powers of the Senate is shown in other passages of the laws also. The minor officials, including the quaestors, are to be legally bound to execute all commands of the Senate in addition to performing their regular functions.<sup>12</sup> We have no evidence that the Senate ever actually had any such legal rights over these officials. Also, the number of praetors may be fixed by senatorial decree as well as by popular law,<sup>13</sup> and the appointment of a dictator is made absolutely dependent on the Senate's decree,<sup>14</sup> the consul being deprived of all discretion in the matter.

The most important actual change made by these "laws" is the provision of a firm legal basis for the power which the Senate already held practically, thus removing the most important claims of the Senate from the realm of controversy. As we have seen, however, no attempt is made to deprive the People of their legal supremacy.

Cicero's provision in regard to membership in the Senate is somewhat obscure: *omnes magistratus auspicium iudiciumque habento, exque is senatus esto*.<sup>15</sup> This might be thought to mean that all magistrates are automatically to become members of the Senate. Another interpretation is that Cicero was thinking only of the *magistratus maiores*; this would mean that the requirement for entrance would be the holding of the aedileship. Or Cicero might merely have meant that only men who had held some magistracy could be admitted to the Senate, leaving the decision as to which ex-magistrates should become senators to the censors.

The first interpretation seems most unlikely, as such a rule

<sup>11</sup> § 28: *cum potestas in populo. auctoritas in senatu sit . . .*

<sup>12</sup> § 6: *quodcumque senatus creverit agunto.*

<sup>13</sup> § 8: *quodcumque senatus creverit populusve iusserit, tot sunt.*

<sup>14</sup> § 8: *. . . si senatus creverit . . .*

<sup>15</sup> § 10.

would give seats in the Senate to all the young men who had held any of the offices of what was later called the vigintivirate, as well as to the ex-quaestors. The second interpretation seems to be excluded by the fact that Cicero expressly says *omnes magistratus*. The third explanation of Cicero's words seems to be the only reasonable one. If we accept it, we must interpret the words *sublata cooptatione censoria*<sup>16</sup> as abrogating the censors' legal right to go outside the list of ex-magistrates in their choice. This law, then, simply embodies in definite form approximately the practice actually followed for some time before the reforms of Sulla. It is a compromise between the older principle of free choice by the censors and the Sullan law attaching entrance to the Senate to the holding of a particular magistracy. Cicero obviously had in mind the method of choice actually in use; i. e., that a vacancy should normally be filled by the ex-magistrate of highest rank who was not already a member, with due regard for moral character.<sup>17</sup> He says nothing about the number of senators being fixed, but we may suppose that this was taken for granted. In most cases, of course, this left the censors little actual power in the matter, and we must agree with Cicero's statement<sup>18</sup> that this is a democratic provision, as it practically left the choice of senators to the people.

Two innovations in regard to the popular assemblies may be noted. In the first place, the method of voting proposed by Cicero<sup>19</sup> seems to be quite original. It embodies a compromise between the old method of viva voce voting and the secret ballot used in Cicero's own time. The people are to have the ballot and freedom in the use of it, but it is no longer to be secret; a man's ballot is to be shown to any of the *optimates* who wish to see it or to whom he wishes to exhibit it.<sup>20</sup> This plan preserves

<sup>16</sup> In Cicero's commentary, § 27.

<sup>17</sup> § 7: Censores . . . probrum in senatu ne relinquonto. § 10: Is ordo vitio vacato. Cf. commentary, § 29: nam cum omni vitio carere lex iubeat, ne veniet quidem in eum ordinem quisquam vitii particeps.

<sup>18</sup> § 27: populare sane neminem in summum locum nisi per populum venire sublata cooptatione censoria.

<sup>19</sup> § 10: Creatio magistratuum, iudicia populi, iussa vetita cum suffragio cosciscuntur, optumatis nota, plebi libera sunt. Cf. Cicero's commentary, §§ 33-39.

<sup>20</sup> In regard to this law, the question at once arises: exactly whom

the power and freedom of the assembly, but also gives full opportunity for the exertion of influence or pressure on individual voters by the aristocracy.

The other *novum* in regard to the assemblies is the rule making the presiding magistrate legally responsible for any use of force or similar irregularity at meetings of an assembly.<sup>21</sup> Cicero quotes a precedent for putting the blame on the presiding official in such cases, since he had the power of dismissing the assembly at any time, but it is clear that this responsibility had never been fixed by law, and that such officials had never been liable to prosecution. This law certainly makes them so liable.<sup>22</sup>

In the provisions in regard to the state officials there are several interesting points to be noticed. The law which fixes the rank of the aedile<sup>23</sup> is rather obscure. As this office is taken up immediately after the minor magistracies, the treatment following the ascending order, Cicero may have intended to indicate by this sentence merely that he was now passing to the *maiores*, the aedileship being the lowest of these, and occupying a sort of middle ground between the two classes. But considering the extreme conciseness of these laws, it seems that he must have meant more than what would have been obvious to his readers without being stated. If so, the meaning can only be that the aedileship is to be a necessary preliminary to the holding of the offices above it. In that case, Cicero is proposing a legally fixed *cursus honorum*. In his provisions in regard to the minor magistracies, the quaestorship is put on the same basis as the various offices of the so-called vigintivirate. Clearly one of these minor magistracies was to be held first, and then the aedileship, praetorship and consulship.

The fact that the plebeian tribunate is not mentioned at all among the regular magistracies is of course natural, since the

did Cicero mean by *optimates* and by *optimus quisque et gravissimus civis* (§ 39)? Such indefinite expressions could not be used in an actual law, certainly. Here Cicero's proposal is very far from being in legal form. Perhaps the privilege of examining ballots was to be confined to senators, but we cannot be certain.

<sup>21</sup> § 11: *Ast quid turbassitur in agendo, fraus actoris esto.* Cf. commentary, § 42.

<sup>22</sup> § 42: . . . *cuius impunitatem amittit hac lege.*

<sup>23</sup> § 8: *ollisque ad honoris amplioris gradum is primus ascensus esto.*



tribune was not a Roman magistrate. But it seems probable that Cicero, in his arrangement of the *cursus honorum*, was once again attempting a compromise; this time between the absence of the requirement of any definite minor office or offices as a preliminary to the praetorship, which made it possible for the tribune to advance directly to this office, and Sulla's law which closed the higher offices of the state to the tribune. If this interpretation is correct, Cicero, while leaving the path of advancement open to the tribune, was proposing to prohibit him from omitting the aedileship, thus lessening the importance of the tribunate as a means of political advancement.

The most striking innovations of the whole code are those which refer to the censorship. They amount to a complete revival and reconstitution of the office. No change is made in its rank, as it occupies in Cicero's treatment its normal position between the aedileship and the praetorship. But the office is to be occupied continuously instead of intermittently, and the term is therefore lengthened to five years.<sup>24</sup> Functions borrowed from Greece, but entirely strange to Rome, are assigned to the censors.<sup>25</sup> They are to be responsible for the correctness of the text of the laws, and also to receive reports from all magistrates after their retirement from office and to render a preliminary or tentative decision upon their official acts. But a favorable decision by the censors is not to free the ex-magistrate from the liability to prosecution. Another rather indefinite duty seems to be assigned to them as *νομοφύλακες*.<sup>26</sup> They are to "observe the acts of men and recall them to the laws." That is, the general task is assigned to them of watching for violations of the law and calling attention to them. We may conjecture that illegality in official acts was chiefly thought of in this provision.

<sup>24</sup> § 7: Magistratum quinquennium habento . . . ea potestas semper esto. Cf. § 47: . . . censoribus, quando quidem eos in republica semper volumus esse.

<sup>25</sup> § 11: Censores fidem legum custodiunto; privati ad eos acta referunto nec eo magis lege liberi sunt. Cf. commentary, §§ 46-47.

<sup>26</sup> § 46: nec ei solum litteras, nam id quidem etiam apud maiores nostros erat, sed etiam facta hominum observabant ad legesque revocabant. Haec cura detur censoribus, . . . Cf. Daremberg et Saglio, *Dict.*, s. v. *Nomophylakes*; Pauly-Wiss., s. v. *Demetrius von Phaleron*, Sp. 2825 f.

Perhaps this new duty of the censors is on the whole no more shadowy and indefinite than the supervision over morals traditionally exercised by them. Its introduction into the Roman state was undoubtedly suggested to Cicero by his admiration for Demetrius of Phaleron.<sup>27</sup>

The most radical of these innovations in the censorship is the proposal to introduce into Rome the Greek *εἰθυα* in modified form. Though the preliminary judgment of the censors did not preclude prosecution, it would have had very great influence, of course, and it seems probable that Cicero, in drafting this law, was thinking, as he so often was, of his own banishment. Was he not seeking to give additional protection to the magistrate who had clearly acted for the best interests of the state, but who, by a technical violation of the law, had laid himself open to malicious prosecution? This appears to be the most likely motive for such a radical proposal.

Perhaps this same idea will give us a clue to the meaning of one of Cicero's provisions in regard to the consuls: *ollis salus populi suprema lex esto*.<sup>28</sup> This has been understood as referring to the freedom of action given by the *senatus consultum ultimum*. But such an interpretation seems to be out of the question, on account of the lack of any reference to the Senate. If this had been Cicero's meaning, it seems certain that he would have expressed his law in such a manner that the phrase *si senatus creverit* could have been included in it. To interpret this provision as referring to the consul's military command<sup>29</sup> also seems forced. The only other possible interpretation—one which has been universally rejected as unthinkable—seems to be the literal one that Cicero actually intended to place the consuls above the law, thus making an exception to the first provision in his code.<sup>30</sup> I believe, however, that this interpretation is the only reasonable one, and that Cicero here intends to give the consul extraordinary powers in cases of emergency, without the necessity of action by the Senate. In spite of the radical nature

<sup>27</sup> § 14.

<sup>28</sup> § 8.

<sup>29</sup> As is done by Du Mesnil in his edition of *De Legibus*, Leipzig 1879, p. 207.

<sup>30</sup> § 6: *Iusta imperia sunt*. Cf. Du Mesnil's note, *op. cit.* p. 195.

of such a concession, it probably seemed to Cicero that in actual practice there would be little danger in it. After retiring from office the consul would be subject to judgment by the censors, and then would be liable to prosecution for any illegal acts committed. In order to claim the protection of this *suprema lex*, it would be necessary for him to prove that "the safety of the people" had been in actual danger, and that his transgression of the ordinary laws of the state had been necessary for its preservation.

If this was Cicero's intention, he must, of course, have been thinking once more of his own banishment, and providing another safeguard for the protection of a consul who saved the state by acts which were technically illegal.<sup>31</sup> But there was a theoretical reason as well as a practical one for the granting of this power to the consul. Cicero must have seen that the consulship was the weakest point in the identification of the theoretical "balanced constitution" of the Greeks with the actual constitution of Rome. The "royal element" was conspicuously lacking in strength in these theoretical laws in comparison with the aristocratic and democratic, particularly after the establishment of the power of the Senate on a firm legal basis. The consulship must therefore be strengthened. For this purpose the *senatus consultum ultimum* is dropped entirely, and the extraordinary powers which it was thought of as conferring are granted outright to the consul, to be used in his discretion whenever needed, but with the knowledge that he would be held strictly responsible for their use.<sup>32</sup>

The law prohibiting *legationes liberae*<sup>33</sup> is also a new provision. Cicero had proposed the abolition of this form of senatorial graft during his consulship, but had succeeded only in reducing the length of such appointments, formerly unlimited, to one year.

The last of our list of innovations is Cicero's general rule in regard to punishments.<sup>34</sup> The principle that the punishment

<sup>31</sup> Cf. Cauer, Ciceros politisches Denken, pp. 114 f.

<sup>32</sup> The use of the phrase *nemini parento* (§ 8) may be considered as an additional indication of Cicero's intention to strengthen the power of the consulship.

<sup>33</sup> § 9; cf. commentary, § 18.

<sup>34</sup> § 11: *Quod quis earum rerum migrasset, noxiae poena par esto*; cf. commentary, § 46.

should fit the crime was in more or less general agreement with the practice in Rome as well as elsewhere. But the formulation of a constitutional provision to the effect that the kind of punishment was always to correspond in this way to the nature of the crime seems to be original.

The elements which are revivals of old laws repealed before Cicero's time are few. The only provisions which can be so classified with any degree of certainty are that which allows the punishment of citizens by flogging,<sup>35</sup> and that which limits the right of appeal to the city of Rome.<sup>36</sup> Both these provisions are intended to restore some of the lost power of the higher magistrates, and can perhaps be explained in the same way as the additions to the consul's power—that is, as attempts to strengthen the royal element in the state. The provision in regard to the dictatorship cannot, of course, be classed as a revival of an institution which had been abolished, as this office was still recognized as a part of the existing Roman constitution.

The element of the constitution which would perhaps seem strangest to the modern legal mind is the occasional introduction of provisions of a moral rather than a legal nature—provisions which could not be made into enforceable laws. Such are some of the stipulations as to the conduct of military commanders and provincial governors,<sup>37</sup> the exhortation to the Senate to set a good example to the rest of the citizens,<sup>38</sup> the recommendation of moderation to legislative bodies,<sup>39</sup> the statement of the political duty of a senator,<sup>40</sup> and the praise given to the official who uses the power of intercession in a helpful way.<sup>41</sup> Such rules, for which there could be no sanction, would not seem so out of place in an ancient code as in a modern one. And Cicero's love for the old spirit of republican patriotism,

<sup>35</sup> § 6: multa vinculis verberibus coerceto. Cf. Mommsen, *Roem. Strafrecht*, p. 47.

<sup>36</sup> § 6: Militiae ab eo qui imperabit provocatio nec esto. Cf. Strachan-Davidson, *Problems of the Roman Criminal Law*, Oxford 1912, Vol. I, pp. 115-126.

<sup>37</sup> § 9: Populi sui gloriam augento; domum cum laude redeunto.

<sup>38</sup> § 10: ceteris specimen esto.

<sup>39</sup> § 10: quae cum populo quaeque in patribus agentur modica sunt.

<sup>40</sup> § 11: Loco senator et modo orato; causas populi teneto.

<sup>41</sup> § 11: Intercessor rei malae salutaris civis esto.

and his desire for its restoration, must have suggested these exhortations to political righteousness. Each one of them is a rebuke to one of the political evils or abuses of the time, which was out of reach of the law. But, futile as such rebukes were, Cicero was unable to devise a practical remedy.

It seems strange that comparatively so little attention has been paid to the *De Legibus* by modern authors who have discussed Cicero's political theories and ideals. Is this not preëminently the place to look for Cicero's best thought-out conclusions as to the reforms needed by the Roman state, and the constitution best suited to it? Here he is concrete and detailed; in other works, including the *De Republica*, he is abstract and indefinite. In his letters to Atticus he is extremely frank, to be sure, but the political opinions found there are often the hasty thoughts of the moment, largely influenced by personal considerations.

Let us see, then, what kind of a constitution it is, on the whole, which Cicero presents as his ideal. Are we to conclude, with Cauer, that in spite of its pretence to perfect balance it is predominantly aristocratic, with only a few sops thrown to the multitude in the shape of worthless "democratic concessions"? <sup>42</sup>

As we have just seen, the constitution bears on its face the appearance of being a compromise between the extreme aristocracy, best represented by the reactionary constitution of Sulla, and the extreme proposals of the *populares*. Is this appearance a false one? The power of the Senate is definitely established, but not greatly increased. Additions are made to the duties and influence of the censorship, to the discretionary power of the consuls in times of emergency, and to the judicial powers of the higher magistrates. On the other hand, no attempt is made to limit the supreme power of the People in their assemblies; the Senate is given none of its old control over popular legislation. The rights of the plebeian tribunes are not limited, and the path of political advancement remains open to them. A compromise method of voting in the assemblies is recommended, which gives freedom of action to the people, but leaves the way as open as possible for the exertion of aristocratic influence over them.

<sup>42</sup> Cauer, *op. cit.*, pp. 41 f. and 88 f.

The provision last mentioned, it seems to me, gives the keynote of the whole system, and of Cicero's idea of a balanced constitution. Absolute power is given to the People, but as many opportunities as possible are provided for the play of senatorial influence upon this all-powerful democracy. This influence is to be strengthened even by the use of deceit, when necessary.<sup>43</sup> Obviously we must give full assent to Cauer's conclusion that Cicero believed all the political wisdom of Rome to be the exclusive property of one class, the senatorial, which supplied the aristocratic and royal elements in his ideal state. But I think this fact has led Cauer to underestimate the genuinely democratic elements in Cicero's constitution. If he thinks of the common people as entirely lacking in political wisdom, why has he given them the supreme power in the state? Simply because he recognizes the great fact that, in any form of state, they actually possess the supreme power. This fact he had doubtless learned from practical experience as well as from the treatises of the Greek theorists, who realize it fully, and recognize that a government whose laws do not grant the supreme power to those who actually hold it cannot hope to be a stable one. This point of view, in my opinion, gives a complete explanation of Cicero's constitution as we have it. Only the aristocracy<sup>44</sup> can govern the state wisely, but it cannot govern the state at all, except with the full approval of the People. This approval is in general to be gained by persuasion; but when this is found impossible, by trickery based on popular superstition. But no attempt is to be made to *force* the will of the governing class upon the People. Cicero, of course, like the rest of the *optimates*, thinks of the People's combination of political power with entire lack of political wisdom as an evil, but he differs basically from the extreme conservatives in his realization that the maintenance of this power is absolutely necessary.<sup>45</sup>

<sup>43</sup> II, §§ 30-31.

<sup>44</sup> Naturally Cicero, remembering his own origin, could not have thought of this aristocracy as a close corporation, which did not admit new blood. But just as a definite order was to be observed in holding the state offices, so membership in the governing class must be attained gradually, by passing through the preliminary stage of membership in the equestrian order, consisting of those citizens who had an especially large "stake in the country." Cf. Zielinski, *Cicero im Wandel der Jahrhunderte*, 3. Aufl., p. 149.

<sup>45</sup> A somewhat similar distrust of real "popular government" was

Of course the readers of Cicero's treatise would be members of the governing class. Therefore he lays the greatest emphasis in his commentary on the defence of the democratic elements in his constitution, not on that of the most original elements. The space which he gives to upholding the retention of the tribunate with full powers<sup>46</sup> against the conservative arguments of Quintus and Atticus, and to the defense of his compromise form of ballot<sup>47</sup> is out of all proportion to the short passage devoted, for example, to his radical additions to the duties of the censorship.<sup>48</sup> In fact, for the benefit of this conservative reading public he takes pains to minimize the amount of new material in his constitution—almost to deny its existence.<sup>49</sup>

Thus we must conclude that the idea of a balanced constitution was more than an attractive theory of political philosophy to Cicero; he took it seriously as an ideal of practical politics, as Zielinski maintains. This was certainly the case at the time when the constitution in *De Legibus* was written, which of course does not prove that Zielinski has not overemphasized his consistent adherence to it throughout his career.

We have not yet touched upon one element in Cicero's ideas which has been emphasized by both Zielinski<sup>50</sup> and Cauer.<sup>51</sup> This is Cicero's idealization of the period of the Scipios, including the Roman government as constituted at that time. From our examination of the changes in the constitution which Cicero

shown by the makers of the Constitution of the United States, particularly in their careful avoidance of provisions for the choice of the President and Senate by direct popular election.

<sup>46</sup> §§ 17; 19-26.

<sup>47</sup> §§ 33-39.

<sup>48</sup> §§ 46-47. A comprehension of Cicero's point of view in this respect may go far to explain the "unevenness of treatment" which has been so often mentioned as a characteristic of the commentary on the "laws." (For example, see A. Reifferscheid, in *Rh. Mus.* 17 (1862), p. 269.)

<sup>49</sup> II, § 23: *Si quae forte a me hodie rogabuntur, quae non sint in nostra re publica nec fuerint, tamen erunt fere in more maiorum, qui tum ut lex valebat.* III, § 12: *Nihil habui sane non multum quod putarem novandum in legibus.* But compare III, § 37: *Quoniam non recognoscimus nunc leges populi Romani sed aut repetimus ereptas aut novas scribimus . . .*

<sup>50</sup> *Op. cit.* pp. 183-188.

<sup>51</sup> *Op. cit.* pp. 33 f.

actually recommends in his "laws," it is obvious without further comment that he has attempted to bring the Roman constitution into perfect conformity with his ideal balanced form of government, not by a return to the actual laws of Scipio's time, but by means of new laws which are either compromises or entirely original. Reverence for the earlier Roman constitution is much more prominent in the generalizations of the *De Republica* than in the definite constitution contained in the *De Legibus*. The conservative statements of the former work, and Cicero's claims to conservatism in the *De Legibus*, have evidently had the effect of concealing from modern critics, to a great extent, the innovations which actually appear in that treatise.

The political spirit of the age of the Scipios seems to have awakened Cicero's fullest admiration. He conceived of it as a time when the people gave their willing assent to the efficient government of a wise and patriotic aristocracy. And he accepted fully the Greek theory that the constitution of the older Roman republic had come closer than any other to an ideal balance of powers. But his loyalty and admiration did not extend to the detailed provisions of the constitution of the period he admired, and therefore his proposed reforms are to be brought about by new methods rather than by an attempt to restore those provisions.

Cicero not only compares the spirit of his own times unfavorably with his idealized conception of the spirit of the older Republic; he even goes so far as to recognize frankly that his ideal constitution would have no chance for practical success in his own day. Therefore we have considered Cicero's political ideals entirely apart from the political conditions under which he lived. Indeed there is little actual relation between the two. For those conditions he obviously had little real understanding, and therefore he could provide no cure for the ills of a dying Republic. But certainly, in the constitution which he composed for a Roman Republic of the ideal future, he has shown far more originality than has ever been recognized.

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